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# Waiver of Immunity - Public Officials

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# WAIVER OF IMMUNITY—PUBLIC OFFICIALS

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REALISTICALLY, ours is a government of laws and men, of institutions and personalities. Presently it seems that our institutions and establishments are under an attack that is unparalleled in terms of its sources and intensity. Yet, in the political process, the communications media and other forces have focused attention, as never before, on the men and personalities. Similarly, many who are critical of the institutions would be content with new men in those same institutions. For those who inhabit the rank and file, confidence in the integrity of public officials is often more important than institutions or issues.

The legal system faces these grave matters when it is called upon to determine permissible standards for dismissal of public employees. The present discussion is concerned with striking a delicate balance between the interest of the individual in freedom from self-incrimination and the need of the state to protect itself against corrupt influences within its institutions. The relation of freedom from compulsory self-incrimination to individual liberty is firmly established as the law of the land. Yet public confidence in the integrity of officials must be the highest order of business—an ideal, central to democracy, that is at once simplistic in formulation and yet inscrutable with respect to its attainment. Realization of the ideal is obstructed by many forces—among them public judgment that is often hasty or emotional, and inability or unwillingness to make distinctions that are important in law. A publicized scandal involving prosecution or discipline of an official can evoke public response that is either cynical or sanguine. Still we must persevere in expecting

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and demanding much of our public officials in order to insure that our ideal contributes to the "sober second thought of the community, which is the firm base on which all law must ultimately rest." [1]

With *Gardner v. Broderick*[2] the Supreme Court has finally resolved the principal confusion surrounding dismissal of public employees and, at once, has added an important page to the continuing exegesis of the privilege against self-incrimination. Gardner, a New York City patrolman, was called before a grand jury which was investigating alleged bribery and corruption of police officers. He was advised that he would be examined concerning the performance of his official duties and was asked to sign a waiver of immunity after being told that he would be fired if he refused. He refused to sign and after an administrative hearing he was discharged from public office as provided in the New York City Charter.[3]

Gardner then brought an Article 78 proceeding seeking reinstatement. The lower court dismissed the petition and the New York Court of Appeals affirmed in a unanimous opinion.[4] The Supreme Court reversed, holding that the "mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." [5] In a most important dictum the Court added that the privilege would not bar dismissal if appellant had refused "to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself." [6]

The law in this area was formerly dominated by the pithy statement of Holmes that one "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [7] The Holmes dictum readily reduced itself to the right-privilege formulation and thus the conclusion that public employment must be accepted on whatever terms are offered. This conclusion was fortified with respect to waiver of immunity because the self-incrimination clause of the fifth amendment was not applicable to the states until 1964.[8] The states were free to interpret their own constitutional provisions as they saw fit.[9]

The *Slochower* decision[10] initiated the evolution of the present law although the direction it charted was temporarily reversed. A New York City college professor had invoked the fifth amendment before an investigating committee of the United States Senate and was discharged from his position. The Court held that

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[1] Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).
[2] — U.S. — (1968).
[3] N.Y.C. CHARTER § 1123.
[4] 20 N.Y.2d 227, 229 N.E.2d 184, 282 N.Y.S. 2d 487 (1967).
[5] — U.S. —, — (1968).
[6] *Id.* at ——.
[7] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).
[8] Malloy v. Hogan, 378 U.S. 1 (1964).
[9] Cohen v. Hurley, 366 U.S. 117 (1961).
[10] Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

the summary dismissal violated due process.

In the five years after *Slochower* the pendulum was first suspended and then returned to its point of beginning as the Court sustained dismissals of a teacher, subway conductor, and social worker.[11] *Beilan* and *Lerner* are distinguishable because the refusals to answer were before state interrogating bodies, but not so with *Nelson*. Quite apart from such distinctions, the Court, in all three cases, emphasized the findings of "incompetency," "unreliability," and "insubordination" as the predicates for dismissal rather than the imputation of a sinister meaning to the exercise of a constitutional right. At this juncture the law on the subject was semantically balanced on the *Slochower* and *Nelson* holdings—two decisions rather patently in conflict. Effectiveness of state disciplinary measures seemed to turn upon craftsmanship in legislative drafting or in the framing of judicial and administrative findings.

Subsequently, in 1964, *Malloy v. Hogan*[12] established freedom from compulsory self-incrimination as a fundamental right, guaranteed through the fourteenth amendment against state infringement. Three years later, *Garrity v. New Jersey*[13] and *Spevack v. Klein*[14] were decided together, completing the prelude to *Gardner*. *Garrity* involved an investigation conducted by the New Jersey Attorney General. Police officers were called to testify after a warning that refusal would subject them to removal from office. They answered the questions put to them and some of the answers were used in subsequent criminal prosecutions. The Court held that the convictions must be reversed because the answers were tantamount to involuntary confessions. "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." [15] *Spevack,* on the other hand, was a proceeding to disbar an attorney for refusal to produce demanded financial records and to testify at the judicial inquiry. In the judgment of the Court the threat of disbarment was a form of impermissible compulsion to make the lawyer relinquish his privilege.

It was six months later that the New York Court of Appeals unanimously affirmed the dismissal in *Gardner*.[16] The Court reasoned that frankness and candor in discussing performance of duties can be demanded of those who would remain in public office. *Garrity* was distinguished as a criminal prosecution and *Spevack* as involving one not an employee of the state. The reversal in the Supreme Court, without dissent,[17] obscures both the reason for the path chosen by the New York Court and also the strong temptation to pursue that path. After all, the text of the fifth amendment does speak of criminal cases and the separate

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[11] Beilan v. Board of Educ., 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. Los Angeles, 362 U.S. 1 (1960).

[12] 378 U.S. 1 (1964).

[13] 385 U.S. 493 (1967).

[14] 385 U.S. 511 (1967).

[15] 385 U.S. at 497.

[16] 20 N.Y.2d 227, 229 N.E.2d 184, 282 N.Y.S. 2d 487 (1967).

[17] Mr. Justice Harlan wrote a short concurring opinion for himself and Mr. Justice Stewart. Mr. Justice Black concurred in the result.

classification of public employees is analytically appealing and functionally manageable as a standard of decision. Nonetheless, for the reasons appearing in the balance of this paper, it is believed that the logic of the Supreme Court is preferable to the logic of the Court of Appeals.

The *Gardner* decision, with its broad implications, is welcomed not so much for its rejection of the right-privilege distinction but rather for its failure to pay even lip-service to it. Instead the Court assumes the premise advanced in *Slochower*:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.[18]

Privilege may be exercised in appointment to some offices. But our point of departure here should be that it is no proper function of a public official to bestow or withhold privilege, to exercise the power of a public trust as a matter of grace. The privilege concept produces a tolerance of arbitrary and oppressive action and accepts a mechanical labelling process in place of analysis. The category of public employment cannot be consigned, ipso facto, to Holmes' dictum on the strength of the ambivalent arguments that it is, on the one hand, special and apart, and, on the other, that government should enjoy the same freedom to hire and fire as a private employer. As to the former, the expansion of governmental activity today, and especially its economic role as employer, exerts a far-reaching influence upon individuals. Government recruits, trains and accepts the long-term commitment to employ for which there may be little, if any, private counterpart. There is little justification for a view of public employment that demeans and denies the dignity of such labor. As to the latter argument, government should not be free to hire and fire like any private employer simply because it does not, in fact, hire and fire like any private employer. It has powers, sanctions and stigmas unavailable to the private sector. Thus it well may be, as stated by Mr. Justice Brennan in dissent, that

> a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a State to put its entire civil service on such a basis, if as a matter of internal polity it could stand to do so.[19]

Of course, in the present context of self-incrimination and waiver of immunity, the hypothesis is beside the point.

The theme of *Garrity* and *Spevack* is that the public employee, and the lawyer, are entitled to "first-class citizenship" and not a "watered-down version of constitutional rights." The implications of this theme augurs well for those whose lives are

[18] Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956).

[19] Nelson v. Los Angeles, 362 U.S. 1, 16 (1960).

dramatically affected by public institutions, whether educational, housing, social service or others. Fortunately, the law has already begun movement away from right-privilege question-begging in resolving these problems—a likely challenge for the legal system in the next decade.[20]

The generalizations offered above, however, are insufficient for analytical evaluation of *Gardner* and its contribution to the policy embodied in the fifth amendment. Especially troublesome is the formula, perhaps compromise, in the Court's dictum that the privilege would not bar dismissal if the employee refuses to answer questions "specifically, directly, and narrowly relating to the performance of his official duties." [21] *Nelson,* read alongside *Slochower,* was unsatisfactory in that it sanctioned a semantic resolution of the issue—if the state characterized refusal to answer as "insubordination" or "unreliability" it was not exacting a price for exercise of a constitutional right. Is *Gardner* itself formalistic? The opinion of Mr. Justice Fortas indicates why the demand for execution of a document purporting to waive constitutional rights is not tolerated:

> It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.[22]

But the opinion does not explain the conclusory statement that dismissal can follow refusal to answer specific questions—and why such dismissal is not "costly" [23] and therefore an impermissible limitation of the constitutional right. For this we must turn to the interests served by the fifth amendment.

The privilege against self-incrimination has been characterized as "one of the great landmarks in man's struggle to make himself civilized." [24] Mr. Justice Goldberg summarized the breadth of the interests touched by the privilege:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load' . . . ; our respect for the inviolability of the human personality and of the right of

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[20] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

[21] Gardner v. Broderick, — U.S. —, — (1968).

[22] *Id.* at —.

[23] *See* Griffin v. California, 380 U.S. 609, 614 (1965).

[24] E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

> each individual 'to a private enclave where he may lead a private life' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' [25]

This complex of values can be reduced to three broad categories: an abhorrence and distrust of coerced testimony; an interest of privacy; a host of rules or values commonly associated with procedural due process. Yet in the midst of the flowering of the fifth amendment since 1964, the majority opinion in *Schmerber v. California*[26] cautions that the scope of the privilege does not coincide with the complex of values it helps to protect. Also illustrative is the government's need to gather information and the enigmatic "required-records" doctrine announced in *Shapiro v. United States*[27] in 1948 and further clarified only this year.[28]

Dean McKay has recently scrutinized the wealth of precedent and literature in the area.[29] He rejects many of the components of this "complex of values" as unrealistic, redundant or fully protected by other recognized rights. He concludes:

> In sum, from all the welter of reasons given in justification of the privilege against self-incrimination, it seems to me that only two have any great probative force, and they are perhaps opposite sides of the same coin: (1) preservation of official morality, and (2) preservation of individual privacy.[30]

Many of the reasons offered by supporters of the privilege ignore "the real interest of the state in securing evidence otherwise possibly denied to it by the successful plea of the privilege." [31]

This analysis is fully supported by, and facilitates synthesis of *Gardner*. The *Gardner* formula protects the interest of privacy, even that of the public employee, by precluding surrender of it to the sweeping stroke of a waiver of immunity document—a Hobson's choice before a single, specific question is asked. Official morality is preserved by minimizing the opportunity for the fishing expedition.

But surely the interest of privacy is not absolute here and cannot extend to the performance of official duties. The interest of the state in securing evidence of corruption is indeed real and the means of obtaining such evidence is critically limited as illustrated by the frequent resort to wiretaps and informers. When confronted with questions "specifically, directly, and narrowly relating to the performance of his official duties" the public employee may choose to escape criminal prosecution, and also contempt, but he has no further interest of privacy which demands his continuance in public office. At the same time, the state has been made to shoulder the

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[25] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
[26] 384 U.S. 757 (1966). *Cf.* United States v. Wade, 388 U.S. 218 (1967).
[27] 335 U.S. 1 (1948).
[28] Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).
[29] McKay, *Self-incrimination and the New Privacy*, 1967 SUP. CT. REV. 193.
[30] *Id.* at 213-14.
[31] *Id.* at 214.

burden of establishing a foundation for concrete, relevant interrogation. In the context of *Gardner,* this last consideration supports a relation of the privilege to procedural due process beyond that acknowledged by Dean McKay [32]—an assurance against short-cutting procedural due process. If so, it is a fortunate if nonetheless fortuitous consequence developing out of the inconclusiveness of the right-to-hearing cases.[33] Gardner was given an administrative hearing but was discharged solely for refusing to sign the waiver. Such a hearing is both insufficient and unnecessary. But the fact of administrative disciplinary hearings, with the attendant problems of over-zealousness, lack of separation of powers, and limited judicial review, further supports the relation of procedural due process to the *Gardner* rationale.

With *Gardner* the Supreme Court has removed uncertainty on an issue of public importance. Mr. Justice Harlan, who dissented vigorously in *Garrity* and *Spevack,* concurred and welcomed the formula advanced by the Court. Mr. Justice Black stands alone, concurring in the result only. The Court has insured maximum protection to the public employee without stripping government of all opportunity to protect its institutions against corrupt influence within.

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[32] *Id.* at 208-09.

[33] Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951).